No. 84-493

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1984

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Petitioners,

vs.

ARTHUR S. LANGENDERFER, INC. and
NORTHERN OHIO ASPHALT PAVING CO.,
Respondents.

ON PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNSON REPLY TO LANGENDERFER OPPOSITION

THOMAS V. KOYKKA, *Counsel of Record*
NEAL RAINS
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

JOHN M. CURPHEY
JACK ZOUHARY
ROBISON, CURPHEY & O'CONNELL
Ninth Floor
Four Seagate
Toledo, Ohio 43604
(419) 249-7900
Attorneys for Petitioners

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On Petition for Certiorari to
The United States Court of Appeals
For the Sixth Circuit

JOHNSON REPLY TO LANGENDERFER OPPOSITION

Langenderfer, opposing Johnson's Petition for Certiorari, nimbly changes the subject.

1. Predatory Pricing Was Claim Upon the Trial

"Predatory pricing," the centerpiece of the trial, Langenderfer now replaces. It says (pp.2, 3) "The case was tried and submitted as a traditional monopoly case"—not as a "predatory pricing" case. Indeed, it is "inexcusable," Langenderfer says (p.8), for Johnson to say Langenderfer's case "turned on its claim of 'predatory pricing' * * *."

The District Court, listening to a month of trial, found:

> "The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects." (Appendix to Langenderfer Petition in No. 84-508, A42.)

The Court of Appeals emerged from its study of the record with the understanding that the evidence "clearly focused on the claim of predatory pricing." 729 F.2d at 1055. Langenderfer's "theory at trial (and in this appeal) was that defendants [Johnson] intentionally and consistently bid below the cost level of smaller competitors." 729 F.2d at 1056.

Now, to show its claim was (p.2) really "a traditional monopoly case," and not, as the courts below understood, a "predatory pricing" case, Langenderfer (pp.3-4) lists "twelve specific practices" on which it plants its case.

2. Monopoly Charges Now Urged Are Unsupported

Langenderfer has not noticed that its baker's dozen is made up of charges (a) ruled against it for want of support in the record, (b) on which the Court of Appeals held a verdict should have been directed in favor of John-

son, (c) on others which the trial court withdrew from the jury, and (d) on yet others as to which evidence was "scarce" or nonexistent. The documentation is in the Johnson reply in companion case No. 84-508, pp.4-7.

Specifically, of the "anti-competitive acts" Langenderfer lists:

> Four (items 1, 2, 3, 11) are based on Johnson's acquisition of 12 properties over a period of 19 years. The Court of Appeals held the trial court should have directed a verdict in favor of Johnson on *all* of these, save only the last. Langenderfer says (p.22) this was a mere "technicality." Whether "technicality" or not, the result is they were found not to be violations.
>
> Two charges (items 4 and 9) are that Johnson sold stone and sand at "unreasonably high" prices. The trial court withdrew this charge from the jury. Langenderfer never bought from a Johnson Company except when it offered the lowest price.
>
> One charge (item 5) claims Johnson refused to sell stone and sand to competitors. One instance is claimed. It occurred *before* Johnson acquired the property.
>
> One charge (item 6) claims threats—not acts.
>
> One charge (item 10) is that Johnson charged quarry operations with costs attributable to paving. This charge never surfaced in any brief until it appeared in the very last brief filed by Langenderfer in this Court. It has no support.

One charge (item 12) alleges "sheer size"—which has never been held a violation.

Two claims (items 7 and 8) charge "predatory pricing."

Langenderfer's case thus comes back to what it was on the trial—"predatory pricing," a proposition that has no place in the context of statutorily required competitive public bidding, where, as the Court of Appeals found, "Johnson never bid below its own cost * * *." 729 F.2d at 1056.

To shore up its new-found theory, Langenderfer says the trial court enjoined some of these anti-competitive acts.

3. Injunction, Erroneously Granted, Was Properly Vacated on Appeal

The argument concerning the injunction is pure sleight-of-hand.

The trial court did grant an injunction, even though it found the asserted anticompetitive acts "were not specifically proven by evidence at trial." (Appendix to Langenderfer Petition in No. 84-508, A43.)

The trial court explained why it did so. (See Appendix to Langenderfer's Petition in No. 84-508, A44.) The trial court thought it was given license to do so by *International Salt Co. v. United States* (1947), 332 U.S. 392, 400. The sentence the court relied upon was this:

"'it is not necessary that all of the untraveled roads * * * be left open and that only the worn one be closed.'" (Appendix to Langenderfer Petition in No. 84-508, A44.)

The difficulty here is that, as the trial court found, "There was no hard evidence at trial establishing that defendants had actually engaged in these specific practices." (Appendix to Langenderfer Petition in No. 84-508, A44.)

The trial court's error lay in granting an injunction telling Johnson, in effect, that, although it had not violated the law, it must not do so in the future. A district court "may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws," as the Court held in *International Salt*, 332 U.S. at 400, and other cases.

Langenderfer's real complaint on the trial, and now, concerns Johnson's (p.14) "ability to underbid everybody else's costs by 5% to 10% * * *."

Langenderfer's solution is in this sentence (p.15):

> "Why did Johnson year after year 'leave money on the table' when it could have won the jobs anyway by bidding at least 5% higher?"

Does that make sense?

CONCLUSION

The Court should end this wasteful litigation—now.

The Court should grant summary judgment.

No one could complain.

Both parties have asked the Court to do so.

Recall the wisdom of Judge Learned Hand, who, in *United States v. Aluminum Co. of America* (2d Cir. 1945), 148 F.2d 416, put it this way (p.430):

> "The successful competitor, having been urged to compete, must not be turned upon when he wins."

Respectfully submitted,

THOMAS V. KOYKKA, *Counsel of Record*
NEAL RAINS
ARTER & HADDEN
1100 Huntington Building
Cleveland, Ohio 44115
(216) 696-1100

JOHN M. CURPHEY
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